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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE CURTIS SHAW,

Defendant and Appellant.

B193550

(Los Angeles County
Super. Ct. No. MA025252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed as modified with directions.

Law Offices of Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Andre Curtis Shaw was charged by information with the murder of “Jose Gutierrez” (Pen. Code, § 187, subd. (a), count 1); assault with a deadly weapon (an automobile) on “Jose Gutierrez” (§ 245, subd. (a)(1), count 2); the willful, deliberate, premeditated attempted murder of Eric Gutierrez (§§ 664, 187, subd. (a), count 3); and three counts of shooting from a motor vehicle (§ 12034, subd. (c), counts 4, 5 and 6).¹ The information further alleged: with respect to count 2, that appellant personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and section 12022.5, subdivision (a)(1); with respect to count 3, that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c) and personally used a firearm within the meaning of section 12022.53, subdivision (b); and with respect to counts 1, 4, 5 and 6, that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (d) and personally used a firearm within the meaning of section 12022.53, subdivision (b).

The jury found appellant guilty of counts 1 and 3 (involuntary manslaughter and attempted willful, deliberate, premeditated attempted murder), and not guilty of counts 2, 4, 5 and 6 (assault with a deadly weapon and shooting from a motor vehicle). The trial court sentenced appellant to a term of imprisonment for life with the possibility of parole for attempted

¹ The information identified the first name of the victim in counts 1 and 2 as “Jose.” The briefs state that his first name was “Joe,” which was also the name he was called by most of the witnesses at trial. We adopt the name preferred by the parties and the witnesses.

Unless otherwise specified, statutory references are to the Penal Code.

willful, deliberate premeditated murder, a concurrent term of four years for involuntary manslaughter, and an additional term of 20 years for the section 12022.53, subdivision (c) enhancement. The court imposed a number of fines and fees, including two \$20 court security fees as required by section 1465.8, subdivision (a)(1). The abstract of judgment, however, reflected only one such fee.

A. Evidence at Trial

1. Prosecution Case

On September 11, 2002, just prior to midnight, Joe Gutierrez (Joe) and his friend, Guillermo Siri, were at a street corner near Maurice Washington's house talking to some girls when appellant pulled up in a car containing several male passengers, including Jermaine Tryon. Appellant challenged Joe to a fight.² Appellant and Joe fought with their fists for a few minutes. Appellant then got into his car and drove away, leaving his friends behind. Tryon told Siri to be careful because appellant had a gun.

Siri's cousins, who apparently had witnessed the fight, went to Joe's home and told his brother Eric Gutierrez (Eric) that Joe was being "jumped."³ Eric got into the cousins' car and was dropped off at the scene of the fight. Although there were other men at the location, Siri and Joe

² The car, a Camaro, was owned by appellant's girlfriend, Carole Leonardo, and had been lent to him earlier that evening. However, for the sake of simplicity, we will refer to it as appellant's car or appellant's Camaro.

Tryon was sometimes referred to as "Joe" or "JoJo."

³ Siri testified that no one was with him and Joe prior to the fight. Eric testified that Joe left the house that evening with four other men, including two of Siri's cousins.

were the only two men Eric recognized when he arrived. They told Eric that Joe had just been in a fight with appellant.

The three men (Siri and the Gutierrez brothers) began walking down the street to return to the Gutierrezes' home.⁴ They spotted appellant alone in his car, and Joe ran toward it. None of appellant's friends were in the area. As Joe approached the car, he made gestures which Siri interpreted as an invitation to continue the fight. Appellant swerved his car toward Joe, striking him in the leg as he drove past. Eric heard his brother say "that mother fucker hit me."

After driving past the men, appellant made a u-turn and came to a stop. Eric rushed to the car and tried to hit appellant with his fist or to grab him. He also tried to open the driver side door in order to pull appellant out. Appellant moved to the back seat of the car and was "struggling with something." Siri approached the passenger side and kicked the vehicle twice. Neither Eric nor Siri noticed where Joe was.

As Eric was reaching inside the car, he heard a gunshot or possibly two. He pulled back out of the car, grabbed Siri, who was on the other side of the car, and ran. As Eric and Siri were running, Eric heard several more gunshots. Both Eric and Siri saw appellant shooting in their direction. Appellant appeared to be sitting on the window frame with his arms extended over the roof of the car. Eric counted three or four shots.

⁴ The route they were taking was not the most direct route to the Gutierrezes' home, but both Siri and Eric denied they were looking for appellant.

Eric and Siri continued to run until they heard appellant drive away. They returned to the scene, driven by Siri's cousin, and found Joe lying on the ground, shot in his stomach, bleeding to death.

According to both Eric and Siri, no one threw anything at the car or at appellant when he was inside the car. Neither the Gutierrez brothers nor Siri had any weapons. There were no others present during the confrontation with appellant near the car.

Sheriff's investigators called to the scene dug a spent bullet out of the stucco of a nearby residence. They also found two cartridge casings and two live rounds from a .380 caliber weapon on the ground, near where appellant's car had been parked. Ballistics showed that the two cartridge casings and live rounds came from the same gun, and that the bullet found in the stucco came from the same gun as the bullet that killed Joe.

Appellant was arrested in July 2003 by officers for the Los Angeles Police Department. When arrested, he gave a false name and date of birth and later said: "Man, I'm scared. I killed someone, so I have a murder rap on me."

Carole Leonardo, appellant's girlfriend, testified that she let him borrow her car on the night of September 11. She had not had any problems with the car stalling, but it did have difficulty re-starting once the engine was turned off. The car's passenger seat was broken when appellant returned it. She did not carry any weapons in the car. She saw a knife on the floor of the vehicle when appellant returned it to her, but there were no cuts or slashes in the upholstery. Leonardo gave the knife to some friends.⁵

⁵ The parties stipulated that an attorney representing appellant gave the Sheriff's Department a knife. The knife was placed into evidence.

2. Defense Case

a. Appellant's Testimony

Appellant testified that his troubles with the Gutierrez brothers began in early 2002. He was sitting in a van parked near the home of John Washington with some friends.⁶ The Gutierrez brothers and a third Hispanic man walked by. Eric grabbed the bicycle appellant had ridden to Washington's house and started to ride away on it. Appellant stopped the theft and quarreled with the brothers.⁷

A few days later, appellant was visiting John Washington again and encountered Joe, who challenged him to a fight. While the two were fighting, appellant was attacked by Eric and three companions. Appellant's friend David Herd arrived at the scene and attempted to drive appellant away. They were confronted by the Gutierrez brothers and a large group of Hispanic males. At this point, Joe had a knife, which he swung at appellant. Eric also approached holding a knife. Appellant managed to escape and run home, but before he did, Joe slashed at him, cutting his finger. The Gutierrezes and their companions chased him for some distance.⁸

On the night of the incident, appellant was in Leonardo's car with Tryon, Herd and Herd's young cousin, Lamel Scott, headed to Maurice Washington's house. When they arrived, appellant saw Joe standing near a

⁶ John Washington and Maurice Washington are not related.

⁷ Eric confirmed an incident regarding a bicycle, but believed it occurred in September 2002.

⁸ Eric confirmed that appellant and Joe engaged in a fight which culminated in Eric's chasing appellant across several back yards. Eric stated that during the incident, appellant instructed his companions to "shoot [them]," referring to Eric and his brother.

car with four or five companions. Appellant drove a short way down the street and then pulled over because another car tapped his. Appellant, Tryon and Herd got out of their car, while several people, including Joe and Siri, got out of the other car. Appellant and Joe started to fight. Appellant saw that Siri had a knife in his hand. After knocking Joe down, appellant returned to the Camaro and, at Herd's request, left to take Scott home.

Appellant dropped Scott off and returned for Herd and Tryon. Before he could get back to the location of the fight, he saw a large group of Hispanic males -- between 7 and 10 -- running toward his car. Appellant kept driving, trying to get around them. He heard them hitting the car with their fists and started to panic. He tried to get away, but Siri threw a rock, hitting him on the head. This dazed appellant and caused him to stop the car and grab his head. The car's engine cut off. At that point, the Gutierrez brothers attacked him through the open driver side window with knives.

Appellant pushed himself into the passenger seat, which fell back and broke, just as someone slashed at him with a knife from the passenger side of the Camaro. Appellant grabbed a gun from the back seat and pointed it toward Joe.⁹ He felt lightheaded and scared. The gun went off accidentally the first time. Appellant shot twice more out the driver side window. He was not aiming at anyone or trying to hit anyone. He did not know he had hit Joe until someone told him later.

⁹ Appellant testified that he had taken a .380 caliber gun from someone who had become drunk at a party at Herd's house. He kept the weapon with him because he was afraid of the Gutierrezes and because he lived in a dangerous area. He had placed the gun in the Camaro earlier, when he and Leonardo had driven to Herd's house.

After firing the shots, appellant pulled himself back into the driver's seat. Appellant restarted the car and drove to Herd's house, where he met up with Herd, Tryon and Leonardo. As he was driving, he threw the gun out the window. After returning the Camaro to Leonardo, appellant and Tryon walked to appellant's mother's house. Later, in the presence of two other friends, Adrian Soliven and Jannah Afable, Leonardo and appellant found a knife behind the passenger seat of the Camaro. Soliven took possession of the knife. Approximately three weeks later, appellant retrieved the knife and gave it to a lawyer.

b. Other Defense Witnesses

Tryon testified that after the initial fight with Joe on September 11, appellant left, saying he would be back.¹⁰ After appellant left, Eric ran up carrying something that looked like a dagger or spear, yelling "Brown pride" and "[l]et's kill this vato." The Gutierrez brothers and Siri took off running in the direction appellant had driven. Concerned for appellant, Tryon followed. As he approached the area where the second confrontation took place, he saw Siri moving toward the driver side of the Camaro with his arm raised, making a pitching motion. Appellant put his hands to his head, as if he had been struck by something. He appeared dazed. Four men rushed the Camaro -- the Gutierrez brothers were on the driver side, Siri was on the passenger side and an unidentified Hispanic male was climbing on top, from the back. The Gutierrez brothers were making sticking or stabbing motions. At the time appellant fired the shots, the brothers and Siri had gotten their bodies partially into the car. The other man was pounding the top. Tryon

¹⁰ Tryon denied telling Siri that appellant had a gun.

ran away. He heard two gunshots. When he looked back, the four men were still surrounding the car. They began to run after Tryon heard the last gunshot. Tryon never saw appellant hanging out of the car.

Herd recalled that after the initial fight between appellant and Joe, Eric drove up with four or five other Hispanic males who were armed with knives. The group ran toward appellant's house. Herd heard someone say "go get this fool" and saw them rush appellant's car. The Gutierrez brothers had knives out as they approached the driver side; Siri was on the passenger side, throwing rocks. The Gutierrez brothers tried to pull appellant out of the car. Tryon grabbed Joe and pulled him away from the car. Herd heard a shot and started running. He heard another shot within a few seconds. He did not see appellant sitting on the window frame, shooting out.

According to Tryon, when he and appellant met up at appellant's mother's house, appellant appeared frightened and shocked. Appellant said: "They had a shank. They were trying to kill me." According to Adrian Soliven, after the shooting, appellant said he acted in self-defense. Leonardo overheard appellant telling Soliven that the Camaro's engine died, that a group of men ran up to the car, trying to stab him, that the passenger seat broke while the men were attacking him, and that he shot at the men from the back seat.

The defense called a number of witnesses to impeach Siri. Damaine Pettiford testified that Siri told him that he and five or six of his friends attacked appellant with knives and bats and that one of them threw a rock or brick that hit appellant in the head.¹¹ Maurice Washington testified that Siri

¹¹ Washington knew that Siri regularly carried a pocket knife clipped to his pocket. Siri told defense investigator Dana Orent that he and Eric were in the habit of carrying pocket knives at the time of the incident.

told him that after appellant and Joe fought, Siri and his companions chased appellant, appellant's car stalled, Siri and his companions attacked the car, one of the cousins tried to stab appellant, and appellant leaned back in his seat and shot at them through a window. A detective who interviewed Siri on the day of the incident testified that Siri said he heard only two shots, one fired immediately before and one fired immediately after he and Eric started running. Siri did not originally say he saw appellant sitting on the window frame shooting at them, although he did report that several days later.

John Washington testified that Eric told him after the incident that he and his companions threw bricks at appellant and hit him in the head, and also that someone had a knife.

Defense expert Dr. Scott Fraser testified concerning the effects of stress and perception of danger on the human brain and body.

3. Rebuttal

A detective who interviewed appellant testified that during the interview, appellant said his first shot was a deliberate warning shot, not an accidental discharge, and that he fired two additional shots in the direction of an open field.

The ballistics expert testified that the two spent shell casings and two live rounds were found near the sidewalk or gutter area where appellant's car had been parked. Casings are generally ejected toward the right and rear of the shooter. If appellant had shot from inside the car as he described, the casings would likely have stayed inside the car. Live cartridges are generally ejected only if someone manually moves the slide to clear a jam. If this had happened while the shooter was inside the car, the live cartridge would likely have been ejected inside the car. In addition, had appellant

made all his shots from the position he described, no bullet could have ended up embedded in the stucco of the nearby house. Based on the location of the casings and the live cartridges, the expert opined that appellant was standing outside the vehicle, near the driver side door, when the shots were fired.

Leonardo testified that when she drove appellant to his grandmother's house in Los Angeles on the night of the shooting, she did not notice any injury to his face.

B. Instructions

The jury was instructed: "Evidence has been presented that on prior occasions the alleged victim threatened or assaulted or participated in an assault or threat of physical harm upon the defendant. If you find that this evidence is true, you may consider that evidence on the issue of whether the defendant actually and reasonably believed his life or physical safety was endangered at the time of the commission of the alleged crime." "A person whose life or safety has been previously threatened or assaulted by others is justified in acting more quickly and taking harsher measures for self-protection from an assault by those persons, than would a person who has not received threats from or previously been assaulted by the same person or persons."

The jury was informed that "[l]egally adequate provocation may occur in a short, or over a considerable, period of time" and that "the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion and for that person's reason to have returned."

C. Pertinent Argument

Defense counsel argued in closing that there was no premeditation or deliberation, but that appellant acted spontaneously to save his life and that he was reacting to the totality of his experiences with Joe. Counsel also argued that appellant was justified in acting more quickly and taking harsher measures for self-protection because of the prior assaults.

DISCUSSION

A. Evidence of Premeditation and Intent to Kill

Appellant contends there was insufficient evidence of premeditation and intent to kill Eric to support the attempted deliberate premeditated murder verdict on count 3. In this regard, he contends that the jury must have believed he fired the initial shot or shots without intent to kill -- hence the verdict of involuntary manslaughter in the shooting death of Joe. Appellant argues it cannot reasonably follow that he formed the intent to kill and premeditated in the short period of time before the additional shots were fired.

When determining whether the evidence is sufficient to sustain a criminal conviction, “our role on appeal is a limited one.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “[T]he test of whether evidence is sufficient to support a conviction is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.]” (*People v. Holt* (1997) 15 Cal.4th 619, 667, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) “In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial

in light of other facts.” (*People v. Holt, supra*, at p. 667.) “We draw all reasonable inferences in support of the judgment. [Citations.]” (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that “‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

We do not agree that evidence supporting premeditation was lacking. An intentional killing or attempted killing is premeditated and deliberate “if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.” (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) “‘Deliberation’” refers to “careful weighing of considerations in forming a course of action” and “‘premeditation’” means “thought over in advance. [Citations.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) However, the requisite reflection to support deliberation and premeditation “need not span a specific or extended period of time.” (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) “‘“The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” [Citations.]’” (*People v. Koontz, supra*, 27 Cal.4th at p. 1080, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) In *People v. San Nicolas* (2004) 34 Cal.4th 614, the defendant, while cleaning up from killing the first victim, spotted the second victim in a reflection in the mirror and immediately turned and stabbed her. The Supreme Court held that because “[t]he act of planning -- involving deliberation and premeditation -- requires nothing more than a ‘successive thought[] of the mind,’” the brief period between defendant’s seeing the second victim’s reflection and stabbing her was “adequate for defendant to have reached the deliberate and premeditated

decision to kill [her].” (*Id.* at pp. 629, 658, quoting *People v. Sanchez* (1864) 24 Cal. 17, 30.)

The evidence here demonstrated that appellant had an opportunity to drive away from the scene of the second confrontation after maneuvering his car past Siri and the Gutierrez brothers. Instead, he made a u-turn and stopped the car facing the group, knowing he had a gun in the car. The jury did not believe his actions were those of a reasonable man and rejected his self-defense argument. Nonetheless, the jury gave him the benefit of the doubt with respect to the first shot, apparently concluding that the gun may have gone off unintentionally when Joe and Eric were reaching for appellant inside the car. The prosecution witnesses testified that after the first shot, both Eric and Siri ran from the car. Appellant, seeing them retreat, pulled himself out of the car, took aim and fired at them. Although all the witnesses agreed that only a brief time elapsed between the first bullet fired and the subsequent shots, deliberation and premeditation do not require more time than appellant had to reflect.

Appellant contends the testimony of Eric and Siri concerning seeing him sitting in the window frame, articulated for the first time four years after the event, was “not reliable [or] credible.” “[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] . . . [I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.) “““To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical

impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment [Citation.]””” (*People v. Barnes* (1986) 42 Cal.3d 284, 306.)

The events the prosecution witnesses described were not physically impossible. To the contrary, their testimony was corroborated by the physical evidence. The ballistics expert testified that the spent casings and live cartridges would not have been found in the street had the gun been fired from inside the vehicle as appellant described; nor could appellant’s testimony be squared with the fact that a bullet from the same gun that shot Joe was found lodged in the stucco of a nearby residence.

Appellant’s contention that the evidence did not support an intent to kill for purposes of the attempt on Eric is also erroneous. An inference of malice and intent to kill may be derived from the defendant’s act of firing toward a victim at close range, without legal excuse, in a manner that could have resulted in the victim’s death if on target. (*People v. Smith* (2005) 37 Cal.4th 733, 742; *People v. Lee* (1987) 43 Cal.3d 666, 678-679; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225.) The testimony of Eric and Siri supported that appellant deliberately aimed and fired at Eric as he fled.¹² The physical evidence supported the inference that appellant cleared

¹² Appellant contends that the verdict of involuntary manslaughter for the death of Joe is somehow inconsistent with the verdict of deliberate, premeditated attempted murder. He is mistaken. The jury could have had a reasonable doubt whether the first shot -- the shot that hit Joe -- was intentional, but no such doubt concerning the shots fired at Eric as he fled, and could reasonably have concluded the latter were fired after some moments of reflection and deliberation. Moreover, “a jury may make inconsistent findings or verdicts as to a defendant charged with two offenses. An acquittal on one offense will not invalidate a verdict on a second

a jam in the gun in order to continue firing. In short, the evidence supported the jury's finding of intent to kill.

B. *Special Instructions*

Appellant requested three special instructions that the court rejected. First, he asked that the jury receive the following special instruction on the victim's reputation for violence: "A person who has knowledge of another's general reputation for violence, even if he is now [sic, 'not,' we presume] aware of the specific acts of violence upon which the reputation is based, is justified in having a higher degree of apprehension of danger from such an individual and may take harsher measures for his own protection in the event of an actual or threatened assault than a person who has no knowledge of such a reputation. [¶] If you believe from the evidence that the complaining witness had a general reputation for violence and the defendant had knowledge of this reputation and he had reasonable cause to fear greater peril in the event of an altercation with the complaining witness than he would have otherwise, you must take such knowledge into consideration in determining whether the defendant acted in a manner in which a reasonable person would act in protecting his own life or bodily safety."

Second, appellant asked for the following special instruction on duration of provocation: "A defendant may act in the heat of passion at the

offense, although the two verdicts are factually inconsistent.'" (*People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1324; *People v. Nunez* (1986) 183 Cal.App.3d 214, 226, disapproved in part on other grounds in *People v. Palmeri* (2001) 24 Cal.4th 856.) "This rule is based on the realization that inconsistent findings may be caused simply by the mercy or leniency of the jury.'" (*People v. Pettaway*, *supra*, 206 Cal.App.3d at p. 1324; accord *People v. Lopez* (1982) 131 Cal.App.3d 565, 571.)

time of the killing as a result of a series of events that occur over a considerable period of time. [¶] Where the provocation extends for a long period of time, you may take such period of time into account in determining whether there was a sufficient cooling period for the passion to subside.”

Third, appellant asked for the following special instruction on prior threats by the victim’s associates: “Evidence has been presented that on a prior occasion (other individuals) have threatened or assaulted or participated in an assault or threat of physical harm upon the defendant. If you find that (it is reasonable for the defendant to associate these individuals with the alleged victim), you may consider that evidence on the issues of whether the defendant actually and reasonably believed his life or physical safety was endangered at the time of the commission of the alleged crime. [¶] In addition, a person whose life or safety has been previously threatened or assaulted by (another) (or that person’s associates) is justified in acting more quickly and taking harsher measures for self protection from an assault by (that person) (those persons), than would a person who had not received threats from or previously been assaulted by the same person (or that person’s associates).”

Although a defendant generally has a right to have pinpoint instructions on a particular defense theory given to the jury (*People v. Earp* (1999) 20 Cal.4th 826, 886), “instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories ‘is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.’ [Citation.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 570, quoting *People v. Wright* (1988) 45 Cal.3d 1126, 1143.) Further, a court may properly refuse a pinpoint instruction that is an incorrect statement of

law (*People v. Gurule* (2002) 28 Cal.4th 557, 659), that is confusing (*People v. Moon* (2005) 37 Cal.4th 1, 30), that is not supported by substantial evidence (*ibid.*), or that is duplicative of other instructions properly given (*People v. Bolden* (2002) 29 Cal.4th 515, 558). Where the trial court errs in failing to give a requested instruction, “[r]eversal is required only if ‘the [appellate] court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.’ [Citation.]” (*People v. Wharton, supra*, 53 Cal.3d at p. 571, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) With these principles in mind, we address each of the rejected instructions.

1. *Instruction on Victim’s Reputation for Violence*

Appellant based the first of the three rejected instructions on *People v. Smith* (1967) 249 Cal.App.2d 395, in which the court stated: “The law recognizes the well established fact in human experience that the known reputation of an assailant as to violence, even if specific acts are not within the knowledge of a person assaulted, has a material bearing on the degree and nature of apprehension of danger on the part of the person assaulted (and further even if the reputation is unknown) to show that one who is turbulent and violent may more readily provoke or assume the aggressive in an encounter.”¹³ (*Id.* at p. 404.)

¹³ The issue in *People v. Smith* was not instructional error, but whether evidence of the victim’s character or reputation was admissible. (249 Cal.App.2d at p. 404.) The quoted language is generally cited for the proposition that “where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor.” (*People v. Shoemaker* (1982) 135

The court was not obligated to give the instruction requested in view of the other instructions given. The jury was told that if it found true that “on prior occasions the alleged victim threatened or assaulted or participated in an assault or threat of physical harm upon the defendant,” it could take that into account in judging the reasonableness of appellant’s acts. The jury was also informed that a person “whose life or safety has been previously threatened or assaulted” by another was “justified in acting more quickly and taking harsher measures for self-protection from an assault by those persons, than would a person who has not received threats from or previously been assaulted by the same person or persons.” These instructions fit the evidence presented more precisely than the one suggested by appellant. The evidence established specific instances of violence in the past directed at appellant. No evidence was presented that Joe or Eric were violent to third persons or had reputations for violence known to appellant apart from his knowledge that they had behaved violently toward him. The instruction suggested by appellant would have been confusing and misleading. The court did not err in rejecting it.

2. Instruction on Duration of Provocation

Appellant supports the second rejected instruction by citation to authorities stating the principle that provocation sufficient to reduce murder to manslaughter need not occur instantaneously, but may occur over a period of time. (See, e.g., *People v. Wharton*, *supra*, 53 Cal.3d at p. 569; *People v.*

Cal.App.3d 442, 446; see, e.g., *People v. Rowland* (1968) 262 Cal.App.2d 790, 797; *State v. Tribble* (R.I. 1981) 428 A.2d 1079, 1083.)

Berry (1976) 18 Cal.3d 509, 516; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 256.) The authorities relied on involved a low level of provocation on the part of the victim over a considerable period of time. A special instruction was needed because the victim's last actions might not have seemed sufficiently provocative to the jury unless viewed in the context of a lengthy course of conduct. (See, e.g., *People v. Wharton*, *supra*, 53 Cal.3d at pp. 543, 571 [victim killed immediately after throwing book at defendant, but defendant's theory at trial was that he acted after enduring provocatory conduct by the victim over a period of weeks]; *People v. Berry*, *supra*, 18 Cal.3d at pp. 513, 516 [immediately prior to killing, defendant's wife yelled at him for trying to leave, but evidence demonstrated she taunted him for preceding weeks with her infidelities].) Here, there was no need for appellant to establish a long history of provocative conduct to negate malice. The conduct which preceded the shooting -- the physical attack on appellant by the Gutierrez brothers and their companion or companions -- was sufficient in and of itself to support reduction of the charge to manslaughter, if appellant's version of events was believed by the jury.

Moreover, the jury was informed that "[l]egally adequate provocation may occur . . . over a considerable[,] period of time" and that "the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion and for that person's reason to have returned." The instruction did not specifically inform the jury that the past acts could be taken into account in determining whether there was a sufficient cooling period for reasonable passion to subside. But defense counsel was free to argue, as he did, that appellant's past experiences with Joe and Eric influenced his actions on the day of the shooting and that appellant's actions were reasonable in view of all the circumstances. (See

People v. Gutierrez (2002) 28 Cal.4th 1083, 1144-1145 [no error in failing to give pinpoint instruction that legally adequate provocation can occur over a considerable period of time, where “counsel’s argument to the jury fully explicated the defense theme of long-standing provocation in connection with the . . . murder charge”].) The court did not err in refusing to give the instruction.

3. Instruction on Prior Threats by Victim’s Associates

Appellant based the third rejected instruction on authority supporting the proposition that threats from a group with whom the victim associated -- such as a criminal gang -- may be taken into account in determining whether the defendant’s conduct was reasonable. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1066, quoting Evid. Code, § 210 [“A defendant who testifies that he acted from fear of a clan united against him is entitled to corroborate that testimony with evidence ‘tend[ing] in reason to prove’ that the fear was reasonable. [Citation.] Threats from the group on the defendant’s life would certainly tend in reason to make the defendant fearful. This is especially true where the group has a reputation for violence, and that reputation is known to the defendant. Such threats are relevant to the defendant’s state of mind -- a matter ‘of consequence to the determination of the action’ [citation] -- and the trier of fact is entitled to consider those threats along with other relevant circumstances in deciding whether the defendant’s actions were justified.”].)

The court did not err in rejecting this instruction. There was no evidence of past threats on appellant’s life from third parties appellant knew to be associates of the Gutierrez brothers. The defense evidence was that on two prior occasions, appellant had been attacked by the Gutierrezes

themselves while in the company of persons unknown to appellant. The jury was told it could take those past attacks into account in judging the reasonableness of appellant's acts, and that appellant might have been "justified in acting more quickly and taking harsher measures for self-protection from an assault by those persons, than would a person who has not received threats from or previously been assaulted by the same person or persons." These instructions adequately informed the jury of the applicable law and did not require further expansion.

C. Court Security Fee

At the sentencing hearing, the court expressly imposed two court security fees under section 1465.8, subdivision (a)(1), but the abstract reflects only one such fee. In its brief, respondent contends the abstract of judgment should be corrected to impose a second \$20 court security fee. We agree the abstract should be amended.

Section 1465.8, subdivision (a)(1) requires the imposition of a \$20 fee "on every conviction for a criminal offense." In *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865, the court held that under the "plain language" of section 1465.8, the fee should be imposed for each offense for which a defendant is convicted, even if all the convictions occur in a single case. (See also *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6 [citing *Schoeb* with approval, but not specifically addressing the point].)

Appellant contends the abstract should not be amended because the People failed to file a cross-appeal. He cites a recent United States Supreme Court decision -- *Greenlaw v. U.S.* (2008) __ U.S. __ [128 S.Ct. 2559] -- in which the court held that absent a government appeal or cross-appeal, a convicted defendant's sentence could not be increased. The Supreme

Court's holding was not based on constitutional principles, but on federal statutes and procedural law. California courts, on the other hand, regularly correct abstracts in the manner requested by respondent. (See, e.g., *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1524; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084-1085.) Moreover, unlike in *Greenlaw*, here there was no trial court error. The error in preparing an abstract of judgment that failed to reflect the trial court's pronouncement was purely clerical, and such errors may be corrected at any time, even if the result is a greater sentence than that originally imposed. (*People v. Little* (1993) 19 Cal.App.4th 449, 452; *People v. Jack* (1989) 213 Cal.App.3d 913, 916.) We do so here.

DISPOSITION

The judgment is modified to reflect an additional court security fee of \$20 and, as modified, is affirmed. The clerk of the superior court is directed upon issuance of the remittitur to prepare a corrected abstract of judgment as set forth in this opinion and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.